Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)	CC Docket No. 97-146

Comments of CTSI, Inc., RCN Telecom Services, Inc. and Telergy, Inc.

CTSI, Inc., RCN Telecom Services, Inc., and Telergy, Inc., on behalf of its operating companies, hereby file their comments in response to the Commission's Public Notice DA 00-1268, released June 16, 2000.[1] The Public Notice invites parties to update and refresh the records of the above-captioned proceedings regarding mandatory detariffing of Competitive Local Exchange Carrier ("CLEC") interstate access services. Until such time as there is more robust local competition and relatively equal bargaining power between CLECs and interexchange carriers ("IXCs") mandatory detariffing should not be considered.

The United States Court of Appeals for the District of Columbia Circuit recently upheld a 1996 Commission order requiring the detariffing of interstate, domestic, interexchange services of nondominant carriers.[2] In the face of a challenge to the Commission's statutory authority to

[1] RCN, Telergy and CTSI are facilities-based competitive local exchange carriers providing a wide array of local and interexchange voice and data services. RCN provides service in the Northeast and California, Telergy provides service in the Northeast and CTSI provides service in Pennsylvania and New York. RCN has previously filed comments in CC Dkt 96-262. Those Comments are incorporated by reference herein.

[2] MCI Worldcom v. FCC, 209 F.3d 760 (D.C. Cir. 2000).

require mandatory (as opposed to permissive) detariffing, the Court of Appeals affirmed the Commission's decision. In the above-referenced public notice the Commission lists a number of questions upon which it seeks comment "in light of the court's ruling."

The Court upheld the Commission's authority to order mandatory detariffing in the circumstances of the case before it. However, the Court's holding relating to the Commission's authority has no effect upon the overwhelming policy and public interest arguments against mandatory detariffing for CLEC interstate access services. These considerations, which have led virtually every interested party to advocate that the Commission continue its policy of permissive detariffing and not adopt mandatory detariffing, recently have, if anything, become more compelling. Some interexchange carriers ("IXCs") have taken actions that show a total disregard for the law with respect to paying tariffed CLEC access charges. The self-help actions that these interexchange carriers have taken should give the Commission even greater incentive to ensure that competitive carriers have the tool of tariffed rates if they desire to use it.

Although the market for competitive services continues to grow, there has been no substantial change in the market power of competitive access providers *vis a vis* the major interexchange carriers in the past couple of years. Because some interexchange carriers have shown no hesitancy in attempting unilaterally to force a resolution of the issues that they see relating to competitive carrier access charges, the Commission should be loath to take an action that will force new entrants to negotiate their access rates. IXCs generally have significantly more market power than CLECs and have shown that they will use it.[3]

[3] There is a substantial difference between the market conditions that led the Commission to conclude that mandatory detariffing was appropriate in the interexchange market and the exchange access market. In the interexchange market there is no carrier with more than 90% of the market as there is in the exchange access market. Because no carrier is dominant in the interexchange market, the Commission was able to adopt mandatory detariffing for all IXCs. In contrast, the Commission in this proceeding is contemplating mandatory detariffing for only a small section of the interstate access market.

Adoption of mandatory detariffing for all CLECs would exacerbate, rather than solve, the existing disputes between the CLECs and some of the IXCs and could result in the loss of access to interexchange services by end users. With mandatory detariffing IXCs would have little incentive to negotiate in good faith with small CLECs. This could lead to the loss of service to the end users of those CLECs and to partial loss of service to all the customers of the IXC. Neither the customers of CLECs nor the customers of IXCs could be assured that calls to all other end users would be completed. This would violate the Commission's statutory universal service mandate,[4] Section 251(a)(1), and would not be in the public interest.[5]

I. THERE IS NO MARKET FAILURE AND NO NEED TO "CONSTRAIN" CLEC TERMINGATING ACCESS RATES

The Public Notice asks for comment on how mandatory detariffing addresses any market failure to constrain terminating access rates and whether mandatory detariffing would provide a market based solution for excessive access charges by encouraging parties to negotiate terminating access charges. The Commission appears to assume that competitive providers' terminating access rates are excessive and that mandatory detariffing would reduce those rates. Before taking a step that virtually every commenter over the past four years (including the IXCs who would be the supposed beneficiaries of such a rule change) has opposed, the Commission should be very certain that, in fact, a problem exists. The allegations by some of the interexchange carriers that some of the competitive providers' terminating access rates are substantially higher that the average incumbents' rates are well known. But, to our knowledge,

[4] Section 254 specifically includes interexchange services in the services to which universal service principles are applicable. See 47 U.S.C. Sec. 254(a)(3).

[5] Recently, the Commission was presented with "Requests for Emergency Temporary Relief Enjoining AT&T from Discontinuing Service Pending Final Decision" filed by the Minnesota CLEC Consortium. This petition was prompted by CLECs' receipt of letters from AT&T stating that it is not obligated to pay CLEC access charges. The

the Commission has never made a finding that any CLEC access charge is unlawful, much less a finding that there are substantial numbers of the more than 200 CLECs that have unlawfully high access charges.[6]

Indeed, there is substantial evidence before the Commission that, in fact, most competitive providers access rates are within a relatively small range of the incumbents rates when all the charges, not just the per minute charges of the incumbents, are compared.[7] Thus, the entire premise upon which the Commission is considering mandatory detariffing of CLEC interstate access charges is fallacious. There is no need to adopt a solution when no problem has been shown to exist.[8]

II. MANDATORY DETARIFFING WOULD NOT PROVIDE ADDITIONAL BENEFITS TO THOSE IDENTIFIED IN THE HYPERION ORDER AND NPRM FOR PERMISSIVE DETARIFFING

The Public Notice also asks whether mandatory detariffing would provide the same benefits identified in the Hyperion Order and NPRM[9] and whether mandatory detariffing offers additional public interest benefits beyond permissive detariffing. In the Hyperion Order and

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Consortium filed its petition with the FCC to protect its customers against the possibility of AT&T disconnecting service to their customers.

[6] On the other hand, the Commission has previously found that CLECs do not possess market power in the provision of terminating access. Access Charge Reform, Report and Order, 12 FCC Rcd 15982 (1997).

[7] As the Commission knows, some of the information submitted with the AT&T petition for declaratory ruling (CCB/CPD File No. 98-63) was incorrect. In addition, in CC Dkt 96-262 the Association for Local Telecommunications Services ("ALTS") filed a lengthy study by ICC Consulting that demonstrated that there is generally not a significant difference in the total access charges of the competitive carriers and the incumbents. ALTS Reply Comments, CC Dkt 96-262 (filed No. 31, 2000). In that proceeding the second largest IXC, MCI Worldcom (now Worldcom) concluded that there is no evidence that unreasonably high access charges are widespread and argued that rate regulation of CLECs would be unwise. See MCI Worldcom Comments at 18 (filed Oct. 29, 1999).

[8] The Commission appears particularly interested in adopting mandatory detariffing as a market-based solution to the supposed problem of excessive CLEC access charges. At the same time, the Commission seems to believe that the CLECs have been able to charge these high access charges because of their market power in terminating access. If the Commission were to find that the CLECs have market power in terminating access, (which the undersigned parties do not believe is the case) then it would make no sense to adopt a solution relying on market forces to control the rates.

NPRM, the Commission identified the following as benefits of permissive detariffing: reduction of transaction costs for providers; reduction of administrative burdens for service providers; permitting rapid response to market conditions by carriers that attempt to make new offerings; and facilitating entry by new providers.

While mandatory detariffing might provide some of the same benefits that are being provided by permissive detariffing, the issue for the Commission is whether, on balance, there are *additional* benefits to mandatory detariffing that justify a ruling that all CLECs must detariff their interstate access services. In fact, mandatory detariffing would cause additional costs for both CLECs and IXCs and increase the burden on both types of carriers.

A. Transaction Costs and Administrative Burdens

While there are obviously costs associated with the filing of tariffs, it is the estimate of RCN, Telergy and CTSI that the costs associated with the filing of tariffs are much less significant than the costs of negotiating individually with each IXC customer. Without the option of filing tariffs, CLECs would be required to negotiate with every IXC regardless of the amount of traffic, if any, the IXC would be sending to the CLEC.[10] Thus, rather than filing one tariff a carrier could be required to negotiate with hundreds of interexchange carriers. The time and expense involved in such negotiations necessarily would be very substantial and might even prevent some entities from entering the market. In any event, the Commission should not put itself in the position of deciding which administrative costs (tariff filings or individual negotiations) a new carrier should incur.

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[9] In re Hyperion Telecommunications, Inc., 12 FCC Rcd 8596 (1997) [hereinafter Hyperion order]. In that order the Commission adopted permissive detariffing for CLEC provision of interstate access and proposed mandatory detariffing.

[10] CLECs perhaps could block calls from some IXCs but this is not always possible, nor would it be acceptable to customers.

Significantly, even most IXCs support permissive, but not mandatory detariffing of competitive provision of interstate access services, in large part because of the burden that mandatory detariffing would impose on new carriers. In its comments filed in response to the Hyperion notice of proposed rulemaking, AT&T argued that mandatory detariffing would increase CLECs' risks and costs and place them at a serious competitive disadvantage compared to the incumbents:

> Because ILECs will continue to exercise market power over access services for the foreseeable future, the Commission properly requires them to file tariffs for their access services. However, the existence of such tariffs means that the ILECs need not incur any costs to created switched access arrangements with any IXCs; rather they can rely on their tariffs to establish a clear, binding obligations on IXCs to pay access charges. The disadvantage faced by CLECs who are denied the option of filing tariffs is substantially compounded by the costs of and risks attributable to litigation with recalcitrant access customers concerning their obligation to comply with their access terms. The Commission should be especially reluctant to adopt any proposal that would provide the entrenched incumbents with an additional cost advantage over new entrants.[11]

In the AT&T Comments filed in November of 1999 in response to the Commission's Further Notice of Proposed Rulemaking in CC Docket 96-262, AT&T again argued that the "Commission's pro-competitive objections will best be served by *permissive* detariffing of CLEC access charges."[12]

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[11] AT&T Comments in CC Docket 97-146 (filed September 17, 1997) at p. 6-7. AT&T, somewhat prophetically discussed the situation that a CLEC would find itself in if it were unable to rely upon its tariffs for the provision of access services:

> A CLEC confronted by an IXC customer of the CLEC's terminating access service who refuses to pay the CLEC's charges or abide by its other terms of service is placed in an untenable position. The CLEC must chose between expensive and problematic litigation with the IXC to enforce its terms under an implied contract theory (and thus accumulate higher uncollectibles), or attempt to suspend the delivery of interstate, interexchange calls placed by the IXC's end users."

Id at 4.

[12] AT&T Comments in CC Docket 96-262 (filed Nov. 29, 1999) (emphasis added).

B. Burden on the Commission

The Commission also asks whether mandatory detariffing would relieve the Commission of the administrative burden of maintaining tariffs. Of course it would. However, the reduction of a relatively insignificant burden on the Commission does not by itself justify mandatory detariffing.[13] Mandatory detariffing would not relieve the Commission of the possibility of receiving and having to rule upon Section 208 complaints about CLEC access charges and it is entirely possible that mandatory detariffing would lead to a significant increase in the number of Section 208 complaints.[14] The fact that two carriers negotiate a contract does not necessarily relieve the Commission of involvement in issues that may arise from that contract. The Commission's involvement in the issues surrounding reciprocal compensation for calls that terminate at an ISP is ample evidence of that. And, it is clear that the administrative resources necessary to maintain tariffs are miniscule when compared to the resources necessary to rule on numerous Section 208 complaints.

C. Facilitation of New Market Entry

Nor would mandatory detariffing facilitate new market entry. In fact, filing of tariffs is one of the easier and simpler methods of commencing business. As the Commission knows, interstate access tariffs of non-dominant carriers can be effective on one day's notice.[15] Because tariff amendments can be effective immediately, tariffs allow competitors to respond quickly to market changes. There is simply no evidence that the filing of tariffs is a substantial

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[13] While Commenters are unable to precisely quantify the Commission's administrative burden in maintaining tariffs, we note that the various actions that the Commission has taken in the past should have substantially mitigated that burden. If there are significant administration burdens involved, the Commission should look to further streamline its processes through additional electronic means before considering mandatory detariffing. Because ILECs will continue to file access tariffs, the incremental administrative burden for the Commission of maintaining the CLEC tariffs should not be significant.

[14] The Commission has, of course, often stated that the Section 208 process is sufficient to assure that non-incumbent LEC rates are reasonable. Hyperion Order, 12 FCC Rcd at 8609.

burden compared to the negotiation of contracts or that the elimination of the ability to file tariffs will facilitate new market entry. In addition, the inability to file tariffs would place CLECs at a competitive disadvantage *vis a vis* the ILECs, which continue to have well over 90% of the access market and which are not required to negotiate with the numerous interexchange carriers.

The notion that the large IXCs have no bargaining power with the CLECs is just plain wrong. In fact, there exists a tremendous imbalance in negotiating power between the IXCs and the CLECs, with the IXCs holding most of the cards. Not only are the three major IXCs each substantially larger by virtually any gauge than the largest of the facilities-based CLECs, the IXCs could use their enormous purchasing power in the special access services market to force CLECs to provide switched access at very low rates. In addition, as the Bell Operating Companies are allowed into the interexchange market, their interexchange business would have little incentive to negotiate with the competitive access providers. Finally, the IXCs have several legal means to work to bring down any CLEC access charge that it believes is too high. First, of course, the IXCs have the legal avenue of filing a Section 207 complaint in federal court or a Section 208 complaint with the Commission. Second, the IXCs can by-pass the CLEC services by providing their own access services. Inefficient or very high priced providers can and will be driven out of the market. This is what competition is all about.

D. Elimination of the Filed Rate Doctrine

The only concerns other than cost and administrative burden that the Commission has identified about continuing the present scheme of permissive detariffing are the possible invocation of the "filed rate doctrine," and the possibility of price coordination through tariffing. But the filed rate doctrine does not prevent any IXC from attempting to negotiate a

[15] 47 C.F.R. Sec. 61.23.

different agreement with the CLEC for access charges. If an IXC has special needs or can otherwise justify a different service or rate than specified in a tariff of general applicability, negotiated arrangements can be included in a contract tariff.

With respect to the possibility of price coordination, we note that there has been no showing that in fact there has been price coordination among competitive carriers. The rates cited by AT&T, for example in its petition for declaratory ruling in CCB/CPD File No. 98-63 gives examples of CLEC access charges that vary as much as several hundred percent. This is hardly evidence of price coordination.[16]

CONCLUSION

There are no countervailing benefits from mandatory detariffing that can not be achieved through permissive detariffing. Therefore, there is no reason to subject CLECS to the additional costs and competitive disadvantages that would be associated with mandatory detariffing of interstate access services. While the recent D.C. Circuit opinion in MCI v. FCC may give the Commission the legal authority to require mandatory detariffing, the analysis made by all parties over the past four years as to the advisability of mandatory detariffing has not changed, except that perhaps the actions of some of the interexchange carriers in refusing to pay tariffed charges

[16] In any event, the Commission appears to have abandoned price coordination as a rationale for mandatory detariffing. See MCI v. FCC, 209 F.3d at 763 (D.C. Cir. 2000).

provides an even stronger reason to allow CLECs to retain their ability to tariff their interstate access services.

Respectfully submitted

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CERTIFICATE OF SERVICE

I, Elyse Sanchez, hereby certify that on this 12th day of July 2000, copies of the foregoing Comments of CTSI, Inc., RCN Telecom Services, Inc. and Telergy, Inc. were delivered by hand to the persons on the attached list:

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